Emporium Jaya (Bentong) Sdn Bhd (in liquidation) v Emporium Jaya (Jerantut) Sdn Bhd

HIGH COURT (TEMERLOH) — COMPANIES (WINDING UP) NO 28–4 OF 2001
RAMLY ALI JC
28 SEPTEMBER 2001

Companies and Corporations *— Winding up — Attachment of property — Incomplete execution of attachment proceedings by applicants at time of presentation of winding up petition — Petitioner applied to appoint provisional liquidator, whether should be allowed*

Companies and Corporations *— Winding up — Provisional liquidator — Application for — Ex parte application for provisional liquidator after presentation of winding up petition — Factors to be considered — Discretion of court — Balance of convenience — Incomplete execution of attachment proceedings by applicants at time of presentation of winding up petition — Petitioner applied to appoint provisional liquidator — Delay in filing affidavit verifying petition, whether fatal — Whether prima facie evidence to show urgency for application of provisional liquidator — Failure of petitioner to make full and frank disclosure — Whether application should be allowed*

On 17 August 2001, the petitioner presented a winding up petition against the respondent company. The petitioner prayed that the respondent be wound up on the grounds that the respondent was unable to pay its debts and it was just and equitable that the respondent be wound up. On or about 14 August 2001, the petitioner had been informed that an attachment before proceedings were taken by the applicants against the respondent company, of which the bailiff of the Temerloh Sessions Court had taken possession and attached the business premises of the respondent. The date of auction had been fixed on 22 August 2001. The applicants were judgment creditors against the respondent company, who at all material times, had been supplier of goods and merchandise to the respondent company. The petitioner then made an ex parte summons in chambers application praying for, inter alia, the following orders; for the appointment of a provisional liquidator, that the provisional liquidator take possession, control and protect the assets or realize the assets of the respondent company and such assets are not to be distributed or parted with until further order, and that the auction sale scheduled on 22 August 2001 be stayed pursuant to ss 223 and 224 of the Companies Act 1965 ('the Act'). The ex parte order was granted by the court. The applicants being aggrieved and affected by the said ex parte order now applied for it to be set aside. The applicants contended that the said ex parte order obtained by the petitioner was a nullity on procedural grounds and also that the said order could not be sustained on merits.

Held, dismissing the application:

(1) A petitioner could not claim to be a creditor when the debt in question was seriously and substantially disputed, and thus could

not petition for winding up. The dispute must be based on solid grounds. If the dispute were on some grounds which was frivolous or without substance, the court should ignore the dispute. The dispute must also be bona fide. In the present case, the dispute raised by the applicants was not bona fide and not based on solid grounds. Thus the dispute should be ignored by the court. That being the case, the court was of the view that the petitioner qualified to be a creditor for the purpose of s 217(1)(b) of the Act and had the necessary locus standi to petition for winding up of the respondent company (see pp 194E–G, 195C–D).

(2) In the present case, the affidavit verifying the winding up petition was filed on the fifth day after the presentation of the petition. Rule 26 of the Companies (Winding Up) Rules 1972 ('the Rules') requires that it must be filed four days after the presentation of the petition. One day delay was not serious. No substantial injustice had been caused to the other parties. Furthermore, the one day delay, at most, could only be considered as an irregularity which could be cured under r 194(1) of the Rules (see p 196E, G–H).

(3) In the present case, there were prima facie evidence in the affidavit in support of the ex parte application to show the urgency of the matter. The application was filed in court on 17 August 2001, together with a certificate of urgency. The application was fixed to be heard on 20 August 2001. The auction was scheduled to be held on 22 August 2001. In that circumstances, the court was satisfied that there were cogent evidence to show that the delay in affecting service or giving notice of the ex parte application to all related parties, was likely to defeat the purpose of the application. By the time service was done, the auction could have been completed and the purpose of the application fully frustrated. That being the case, the said ex parte application by the petitioner need not be served on the respondent as on every person against whom the order was sought as required under r 7(2) of the Rules (see pp 197H, 198C–E).

(4) Failure of the petitioner to make a full and frank disclosure of all relevant or material facts in their ex parte application would empower the court to set aside the ex parte order. In the present case, the court had considered carefully all the so-called 'undisclosed facts' alleged by the applicants and was satisfied that they were not material and not relevant, in the context of the other materials before the court, at the stage of the ex parte application by the petitioner. Such 'undisclosed facts' were not really essential in determining the issue relating to an appointment of a provisional liquidator. The petitioner's ex parte application was supported by its liquidator's affidavit. All material and relevant facts for consideration were there. The court did not think there was any lack of full and frank disclosure (see p 199B, G–I).

(5) In a petition, a petitioner may choose any one or more of the grounds for winding up as specified in the Companies Act 1965. There was nothing in law to say that a petitioner could only rely on one ground but not more (see p 201E).

(6) An application for a provisional liquidator could be made ex parte after the presentation of the petition. In determining whether or not to appoint a provisional liquidator, the court must consider the degree of urgency, the balance of convenience and the need established by the petitioner. In the present case, the court was convinced and satisfied that there were sufficient prima facie evidence to support the appointment of a provisional liquidator. The element of urgency in the petitioner's application to appoint a provisional liquidator was real. The petitioner could not afford to delay its application even for another day (see pp 197D, 202B, F, H, 203A).

(7) There was no indication at all to show that the respondent company or the liquidator had any hand to play that had resulted in the execution not being completed at the commencement of the petition. There was no sufficient evidence to help the court to invoke s 299(3) of the Act in favour of the applicants. In fact, it would be unjust and unreasonable in the present circumstances. The respondent company was insolvent at the material time. There were other trade creditors at bay. There appear to be no conceivable reason why one or two execution creditors which had not completed its execution should be preferred to the other creditors. This was not a proper case for the court to exercise its discretion under s 299(3) of the Act in favour of the applicants (see p 206F–H).

(8) On the balance of convenience, the court had to see where the justice lies. The court had to weigh the interest of all parties concerned as well as the effect of the court order on them. The basic scheme of the Companies Act was that, in a winding up, unsecured creditors ranked pari passu and that an execution creditor who had not completed his execution at the commencement of the winding up was for that purpose in the same position as any other unsecured creditor. In the present case, justice required that the petitioner's ex parte application should be granted, pending the disposal of the winding up petition filed against the respondent company. To refuse the application would be manifestly unjust to the petitioner and the other unsecured creditors (see pp 207C–F, H–I).

[Bahasa Malaysia summary

Pada 17 Ogos 2001, pempetisyen telah mengemukakan satu petisyen penggulungan terhadap syarikat responden. Pempetisyen memohon agar responden digulungkan atas alasan bahawa responden tidak

A mampu untuk membayar hutangnya dan adalah adil dan saksama bahawa responden digulungkan. Pada atau sekitar 14 Ogos 2001, pempetisyen telah dimaklumkan bahawa satu penggantungan sebelum prosiding telah diambil oleh pemohon-pemohon terhadap syarikat responden, di mana bailif Mahkamah Sesyen Temerloh telah mengambil milikan dan menggantung premis perniagaan responden. B Tarikh lelongan telah ditetapkan pada 22 Ogos 2001. Pemohon-pemohon adalah pemiutang penghakiman terhadap syarikat responden, yang pada setiap masa matan, adalah pembekal barangan dan dagangan kepada syarikat responden. Pempetisyen kemudian telah membuat permohonan ex parte saman dalam kamar memohon, antara lain, perintah-perintah berikut: untuk perlantikan seorang C penyelesai sementara, agar penyelesai sementara tersebut mengambil milikan, kawalan dan melindungi aset-aset atau merealisasikan aset-aset syarikat responden dan aset-aset berikut tidak boleh diagihkan atau diserahkan sehingga perintah selanjutnya, dan agar lelongan jualan yang dijadualkan pada 22 Ogos 2001 tersebut digantung D menurut ss 223 dan 224 Akta Syarikat 1965 ('Akta tersebut'). Perintah ex parte tersebut dibenarkan oleh mahkamah. Pemohon-pemohon yang terkilan dan terjejas oleh perintah ex parte tersebut sekarang memohon agar ia diketepikan. Pemohon-pemohon menghujahkan bahawa perintah ex parte yang diperolehi oleh pempetisyen adalah satu pembatalan atas alasan prosedur dan juga E bahawa perintah tersebut tidak boleh dikekalkan atas merit.

Diputuskan, menolak permohonan tersebut:

(1) Seorang pempetisyen tidak boleh mendakwa dirinya seorang pemiutang apabila hutang yang dipersoalkan adalah dipertikaikan F dengan serius dan banyak, dan maka itu ia tidak boleh membuat petisyen untuk penggulungan. Pertikaian mestilah berdasarkan alasan yang kukuh. Sekiranya pertikaian adalah berdasarkan alasan yang remeh atau tidak kukuh, mahkamah hendaklah tidak menghiraukan pertikaian tersebut. Pertikaian mestilah juga bona fide. Dalam kes sekarang ini, pertikaian yang ditimbulkan oleh G pemohon-pemohon tidak bona fide dan tidak berdasarkan alasan yang kukuh. Oleh itu pertikaian tersebut sepatutnya tidak dihiraukan oleh mahkamah. Oleh demikian, mahkamah berpandangan bahawa pempetisyen layak untuk menjadi seorang pemiutang bagi tujuan s 217(1)(b) Akta tersebut dan mempunyai H locus standi yang diperlukan untuk membuat petisyen penggulungan syarikat responden (lihat ms 194E–G, 195C–D).

(2) Dalam kes sekarang ini, afidavit yang mengesahkan petisyen penggulungan tersebut telah difailkan pada hari kelima selepas petisyen dikemukakan. Kaedah 26 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah tersebut') menghendaki I ia perlu difailkan empat hari selepas petisyen dikemukakan. Kelewatan satu hari tidak serius. Ketidakadilan yang cukup besar tidak dialami ke atas pihak-pihak lain. Tambahan pula, kelewatan

satu hari, paling tidak, hanya boleh diambilkira sebagai satu luar aturan yang boleh dipulihkan di bawah k 194(1) Kaedah tersebut (lihat ms 196E, G–H). A

(3) Dalam kes sekarang ini, terdapat keterangan prima facie dalam afidavit sokongan kepada permohonan ex parte tersebut untuk menunjukkan perlunya tindakan segera tentang perkara tersebut. Permohonan tersebut telah difailkan di mahkamah pada 17 Ogos 2001, bersama sijil tindakan segera. Permohonan tersebut ditetapkan untuk didengar pada 20 Ogos 2001. Lelongan tersebut dijadualkan untuk diadakan pada 22 Ogos 2001. Dalam keadaan berikut, mahkamah berpuas hati bahawa terdapat keterangan yang menyakinkan untuk menunjukkan bahawa kelewatan melaksanakan penyampaian atau memberikan notis tentang permohonan ex parte kepada pihak yang terlibat, kemungkinan boleh menghalang tujuan permohonan tersebut. Apabila penyampaian tersebut telah dilaksanakan, lelongan tersebut mungkin telah selesai dan tujuan permohonan tersebut telah dikecewakan sama sekali. Jika demikan kesnya, permohonan ex parte oleh pempetisyen tidak perlu disampaikan ke atas responden sebagai mana ke atas semua orang terhadap sesiapa perintah tersebut dipohon seperti yang dikehendaki oleh k 7(2) Kaedah tersebut (lihat ms 197H, 198C–E). B C D

(4) Kegagalan pempetisyen untuk membuat pendedahan yang penuh dan terus-terang tentang semua fakta yang relevan atau fakta-fakta material dalam permohonan ex parte mereka akan memberi kuasa kepada mahkamah untuk mengetepikan perintah ex parte tersebut. Dalam kes sekarang ini, mahkamah telah membuat pertimbangan yang teliti tentang semua 'fakta yang tidak didedahkan' yang dikatakan oleh pemohon-pemohon dan berpuas hati bahawa fakta-fakta tersebut tidak material dan tidak relevan, dalam konteks bahan-bahan yang dihadapkan ke mahkamah, di peringkat permohonan ex parte oleh pempetisyen tersebut. 'Fakta-fakta yang tidak didedahkan' tersebut bukan begitu penting dalam menentukan persoalan berhubung dengan pelantikan seorang penyelesai sementara. Permohonan ex parte pempetisyen disokong oleh afidavit penyelesainya. Mahkamah tidak mendapati apa-apa kekurangan pendedahan yang penuh dan terus-terang (lihat ms 199B, G–I). E F G

(5) Dalam suatu petisyen, seorang pempetisyen mungkin memilih salah satu atau lebih alasan untuk penggulungan sebagai mana yang diperuntukkan dalam Akta Syarikat 1965. Tiada apa-apa dalam undang-undang yang menyebut tentang pempetisyen hanya boleh bergantung pada satu alasan sahaja dan tidak lebih daripada itu (lihat ms 201E). H

(6) Satu permohonan untuk seorang penyelesai sementara boleh dibuat secara ex parte selepas petisyen dikemukakan. Dalam menentukan sama ada atau tidak untuk melantik seorang I

penyelesai sementara, mahkamah harus mengambilkira tahap perlunya tindakan segera, imbangan kesesuaian dan keperluan yang dibuktikan oleh pempetisyen. Dalam kes sekarang ini, mahkamah yakin dan berpuas hati bahawa terdapat keterangan prima facie yang mencukupi untuk menyokong perlantikan seorang penyelesai sementara. Dalam kes sekarang ini, elemen perlunya tindakan segera dalam permohonan pempetisyen untuk melantik seorang penyelesai sementara adalah nyata. Pempetisyen tidak mampu untuk lewat dalam permohonannya walaupun untuk satu hari lagi (lihat ms 197D, 202B, F, H, 203A).

(7) Tiada tanda langsung untuk menunjukkan bahawa syarikat responden atau penyelesai memainkan peranan dalam perlaksanaan tersebut. Tiada keterangan yang mencukupi untuk membantu mahkamah untuk menggunakan s 299(3) Akta tersebut bagi menyebelahi pemohon-pemohon. Bahkan, ini adalah tidak adil dan tidak munasabah dalam keadaan sekarang. Syarikat responden adalah tak solven pada masa matan. Wujud pemiutang dagangan yang lain. Tiada sebab yang dapat difikirkan kenapa satu atau dua pemiutang pelaksana yang tidak menyelesaikan pelaksanaannya patut dilayan lebih baik daripada pemiutang yang lain. Ini bukan satu kes yang sesuai untuk mahkamah menggunakan budi bicaranya di bawah s 299(3) Akta tersebut bagi menyebelahi pemohon-pemohon (lihat ms 206F–H).

(8) Atas imbangan kesesuaian, mahkamah perlu melihat di mana letaknya keadilan. Mahkamah perlu mengimbangkan kepentingan semua pihak yang terlibat dan juga kesan perintah mahkamah ke atas mereka. Skima asas Akta Syarikat adalah, dalam penggulungan, pemiutang tak bercagar mempunyai taraf pari passu dan bahawa satu pemiutang pelaksanaan yang tidak menyelesaikan pelaksanaan beliau pada permulaan penggulungan adalah untuk tujuan tersebut berada dalam kedudukan yang sama sebagai pemiutang tak bercagar yang lain. Dalam kes sekarang ini, keadilan menghendaki agar permohonan ex parte pempetisyen sepatutnya dibenarkan, sementara menunggu penyelesaian petisyen penggulungan yang telah difailkan terhadap syarikat responden. Untuk enggan menerima permohonan tersebut adalah amat tidak adil kepada pempetisyen dan pemiutang tak bercagar yang lain (lihat ms 207C–F, H–I).]

Notes

For cases on attachment of property, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 767–768.

For a case on provisional liquidator, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 1093.

Cases referred to

Armorduct Manufacturing Co Ltd v General Incandescent Co Ltd [1911] 2 KB 143 (refd)
Chatib bin Kari v Mosbert Bhd (in liquidation) [1984] 2 MLJ 67 (refd)
Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 (refd)
Clubs Mediterranean Pty Ltd, Re [1975] 1 SASR 481 (refd)
East Cambrian Gold Mining Co Ltd, Re (1865) 12 LT 587 (refd)
Grosvenor Metal Co Ltd, Re [1949] 2 All ER 948 (refd)
Highfield Commodities Ltd, Re [1985] 1 WLR 149 (refd)
Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49 (refd)
Kredin Sdn Bhd v Development & Commercial Bank Bhd [1995] 3 MLJ 304 (refd)
Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors [1996] 2 MLJ 666 (refd)
Kong Long Huat Chemicals Sdn Bhd v Raylee Industries Sdn Bhd [1998] 6 MLJ 330 (refd)
Kumarasamy v Haji Daud [1972] 2 MLJ 16 (refd)
Lo Siong Fong, Re [1994] 2 MLJ 72 (refd)
London & Westminster Co-op Store Co, Re (1868) 17 LT 558 (refd)
Lympne Investments Ltd, Re [1972] 2 All ER 385 (refd)
Mann & Anor v Goldstein & Anor [1968] 2 All ER 769 (refd)
Mark Jaya Engineering Sdn Bhd, v LFY Construction Sdn Bhd [1990] 1 MLJ 372 (refd)
Mc Lennan Holdings Pty Ltd, Re (1983) 7 ACLR 732 (refd)
Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd (formerly known as Jaya Chloride Standby Power Sdn Bhd) [2000] 2 AMR 2495 (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 9 (refd)
Nima Travel Sdn Bhd, Re [1986] 2 MLJ 374 (refd)
North Bucks Furniture Depositories Ltd, Re [1939] 2 All ER 549 (refd)
Official Reciever v J Grind (1933) 7 FMSLR 48 (refd)
Overseas Aviation Engineering (GB) Ltd, Re [1963] 1 Ch 24 (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Anor [1992] 1 MLJ 571 (refd)
Perdana Merchant Bankers Bhd, Re [1997] 3 MLJ 435 (refd)
Pritchard v Westminster Bank Ltd (Garnishee) [1969] 1 All ER 999 (refd)
R v Kensington Income Tax Commissioners; ex p Princess Edmond de Polignac [1917] 1 KB 486 (refd)
Redman (Builders) Ltd, Re [1964] 1 WLR 541 (refd)
South Downs Packers Pty Ltd, v Beaver (1984) 8 ACLR 990 (refd)
Suidair International Airways Ltd (in liquidation), Re [1950] 2 All ER 920 (refd)
Supreme Holdings Ltd v The Sheriff, Supreme Court of Singapore & Anor [1987] 1 MLJ 10 (refd)
Teck Yow Bros Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101 (refd)

A *Tuan Haji Ishak Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 (refd)
Welsh Brick Industries Ltd, Re [1946] 2 All ER 197 (refd)

Legislation referred to

B Companies Act 1965 ss 217(1)(b), 218(1)(e), (i), (2)(a), (b), (c), 219(2), 221, 222, 223, 224, 226(3), (4), 231, 232, 233, 292, 293, 297, 298(1)(c), (2)(a), 299(3)
Companies (Winding Up) Rules 1972 rr 5(2), 7(2), 11, 26 193, 194
Courts of Judicature Act 1964 s 25(2) para 6 Schedule
C Debtors Act 1957 s 19

Ong Ban Chai (*Ong Ban Chai & Co*) for the petitioner.
Mogan Karuppiah (*Fadzil bin Abdullah* with him) (*Mogan Karuppiah*) for the applicants/judgment creditors.
Sawindirjit Singh for the oppossing creditor, Colgate Palmolive (M) Sdn
D Bhd.

Ramly Ali JC: On 17 August 2001, the petitioner, (Emporium Jaya (Bentong) Sdn Bhd, (in liquidation)) presented a winding up petition against the respondent, Emporium Jaya (Jerantut) Sdn Bhd, at the Temerloh High Court vide Companies (Winding Up) Petition No 28 April
E 2001. The said petition was signed by one Mr Koh Kheng Min, the liquidator of the petitioner. The petitioner alleged that the respondent was indebted to the petitioner in the sum of RM18,133.68. The petitioner also alleged that on or about 14 August 2001, the petitioner was informed that an attachment before proceedings were taken against the respondent, of which the Bailiff of the Temerloh Session Court had taken possession and
F attached the business premises of the respondent at Wisma Emporium Jaya, Jalan Kuantan, Jerantut, Pahang. The date of auction has been fixed on 22 August 2001. So, in the petition, the petitioner verily believed that the respondent is insolvent and is unable to pay its debt. The petitioner prays that the respondent be wound up on the grounds that the respondent is unable to pay its debt (s 218(1)(e) of the Companies Act 1965 ('the Act')),
G and it is just and equitable that respondent be wound up (s 218(1)(i) of the same Act).

On the same day, when the petition was presented (17 August 2001), the petitioner has also filed the following documents, namely:

(i) ex parte summons in chambers (encl 3);
H (ii) supporting affidavit of Koh Kheng Min (encl 4); and
(iii) certificate of urgency (encl 2).

The said ex parte summons in chambers (encl 3) prayed for the following orders:

I (i) that Mr Koh Kheng Min of Messrs Koh & Associates, an approved liquidator, be appointed a provisional liquidator of the respondent company under s 231 of the Act;

(ii) that the provisional liquidator is to take possession, control and protect the assets or realize the assets of the respondent company and such assets are not to be distributed or parted with until further order;

(iii) that the petitioner is to give the usual undertaking as to damages which the court may make if the court was of the opinion that the respondent company shall have sustained;

(iv) that the auction sale scheduled on 22 August 2001 or on such other date that may be fixed later against the assets of the respondent company be stayed pursuant to ss 223 and 224 of the Act, and that the costs of the intended auction sale be paid by the provisional liquidator out of the respondent company's assets;

(v) that all further civil actions against the respondent company be stayed pursuant to s 222 of the Act pending the hearing of the winding up petition;

(vi) that the costs of this application be taxed by the court and paid by the petitioner out of the assets of the respondent company; and

(vii) such further relief or order as the court deems fit.

In the affidavit in support of the application (encl 4), the said Koh Kheng Min avers that 'in carrying out his duties as the liquidator for the petitioner, he discovered from the account records that the respondent is indebted to the petitioner for the sum of RM18,133.68 being the 'unpaid balance on goods sold and delivered an unpaid balance on services rendered and advanced'. The said ex parte summons in chambers (encl 3) was fixed for hearing ex parte on 20 August 2001. On that day (20 August 2001), an order in terms of the ex parte summons in chambers was granted by the court. On 21 August 2001, the said ex parte Order was served on the court bailiff. The said bailiff then cancelled the public auction of the movable goods of the respondent company scheduled to be held on 22 August 2001.

All the applicants (in the present proceedings) are judgment creditors against the respondent company, who at all material times, have been suppliers of goods and merchandise to the respondent company. They alleged that as at 30 May 2001, the respondent was indebted to the applicants in the sum of:

(i) RM79,932.21 — to the first applicant, Then Shak Liong;

(ii) RM40,705.00 — to the second applicant, Joo Huat Book Store Sdn Bhd;

(iii) RM48,042.33 — to the third applicant, Joo Huat Stationary & Sports Trading.

being the balance of the price of goods sold and delivered to the respondent company.

The applicants discovered that the respondent's emporium in Jerantut had been closed down and ceased business operation since May 2001. Thus, on 2 July 2001, the applicants filed their respective civil actions against the respondent company to recover the said sums respectively at the

Temerloh Sessions Court. On the same day (2 July 2001), the applicants also filed their respective ex parte notice of application in the said civil actions, praying for an order that all the movable good and property of the respondent company be attached by way of attachment before judgment, under s 19 of the Debtors Act 1957, as a pledge to answer the just demand of the applicants, until the trial of the action and satisfaction of any judgment that may be made against the respondent company. An order in terms of the said ex parte application was granted by the Session Court on 5 July 2001. Consequently, on 18 July 2001, the Temerloh Session Court Bailiff attached the movable properties and goods of the respondent company, at Jerantut, pursuant to the said order of attachment dated 5 July 2001. The court bailiff appointed public auctioneers and proceeded to proclaim the sale of the movable goods attached. The public auction was to be held on 22 August 2001. On 17 August 2001, the said applicants obtained judgment in default of appearance against the respondent company. However, on the morning of 22 August 2001, the applicants were informed by the court bailiff that the said public auction had to be cancelled by reason of the ex parte order of the this court obtained by the petitioner as earlier stated.

The present applications

All the said applicants/judgment creditors being aggrieved and affected by the said ex parte order of this court dated 20 August 2001 obtained by the petitioner are now applying to set aside the said ex parte order vide summonses in chambers in encll 14, 18 and 22, supported by their respective affidavits as in encll 15, 19 and 23. All the three applications are the same in nature where the applicants apply for the following orders:

(1) the applicant/judgement creditor therein, be at liberty to proceed with this application and obtain the Orders and/or reliefs and/or directions prayed for in this application therein;

(2) pursuant to r 193 of the Companies (Winding Up) Rules 1972 ('the Rules'), the honourable court hereby abridges the time appointed and/or fixed by r 7(2) of the Rules for the filing and/or service of any document or otherwise and/or taking any proceeding herein;

(3) pursuant to s 222 of the Act and or pursuant to s 25(2) read with para 6 of the Schedule to the Courts of Judicature Act 1964 ('the CJA'), the enforcement and/or the execution of and/or all further proceedings to enforce and/or to give effect to and/or in relation to the Order dated 20 August 2001, appointing Koh Kheng Min as the provisional liquidator of the respondent therein, and all other or further proceedings in this action or proceeding or petition be stayed or restrained until the final disposal of this application or until further Order by this honourable court;

(4) the Order dated 20 August 2001 (encl 11) appointing Koh Kheng Min as the provisional liquidator of the respondent therein be forthwith set aside;

(5) the said Koh Kheng Min be forthwith removed as provisional liquidator of the respondent therein; A

(6) the public auction of the respondents' moveable goods and property at the respondents' premises scheduled to be held on 22 August 2001 but aborted by reason of the said order of court dated 20 August 2001, be held within seven days from the date of the order to be made hereon, and the bailiff of the court be directed accordingly to carry out of the said auction to proceed with the public auction; B

(7) an enquiry be held by the deputy registrar to assess the damages resulting from the appointment of the said Koh Kheng Min as the provisional liquidator of the respondent herein and in the staying of the said public auction scheduled to be held on 22 August 2001, and such damages so assessed be paid by the said Koh Kheng Min to the said applicant, the bailiff and the auctioneer herein forthwith; C

(8) the cost of this application and/or of the petition herein be paid by the said Koh Kheng Min to the said applicant herein forthwith;

(9) such further or other reliefs or directions which this honourable court deems fit; D

The applications are made under ss 222, 226(3), 232, 297, 298 and 299 of the Act and rr 5(2), 7(2), 11 and 193 of the Rules, and s 25(2) read with para 6 of the Schedule to the CJA, and also under the inherent jurisdiction of the court. E

Contentions of the applicants

All the applicants contended that the said ex parte order obtained by the petitioner dated 20 August 2001 is a nullity on procedural grounds and also the said order cannot be sustained on merits. The applicants submitted that on the following procedural grounds, the petitioner's petition and the said ex parte order dated 20 August 2001 are a nullity and ought to be struck out and set aside: F

(a) there is no proper, valid and effective petition before the court to wind up the respondent company; G

(b) the petition now before the court is a nullity and consequently all subsequent proceedings thereunder, including the ex parte order dated 20 August 2001 is also a nullity;

(c) there is no provision in the Act and/or in the Rules for an ex parte application to be made; and H

(d) that the affidavit in support by the liquidator (encl 4) does not disclose material facts relevant to the case and the said liquidator is therefore guilty of failure to make a full and frank disclosure in his ex parte application.

On the merits of the case, the applicants submitted that: I

(a) the petitioner has not made out a case under ss 217 and 218 Act to present a winding up petition;

(b) that the applicants' attachment of the goods of the respondent on 18 July 2001 by the court bailiff pursuant to an order of the Session Court Temerloh, dated 5 July 2001 is valid and that ss 224 and 293 of the Act are not applicable;

(c) that ss 223, 224, 292, 293, 297, 298 and 299 of the Act are not applicable to protect the petitioner.

Locus standi of the petitioner and the applicants

The applicants are saying that the petitioner, being a company in liquidation is not a qualified person or entity to present a petition for winding up and thus has no locus standi to do so. To support this argument, the applicants argued that only those persons or entities listed under s 217(1) of the Act are qualified to present a winding up petition. The petitioner is not a creditor under s 217(1)(b) of the Act. The alleged debt by the respondent is not proved and thus the petitioner's status as a 'creditor' is questionable.

On the other hand, the petitioner is saying that the applicants have no locus standi to apply to oppose the petition on the ground that an order for winding up of a company shall operate in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor or of a contributory, as provided under s 226(4) of the Act. Therefore, the petitioner argued that the applicants are deemed to be joint petitioners to the petition and they cannot oppose the petition.

The first question for the court to consider and decide is whether the petitioner, in this case is a 'creditor', in order to qualify to initiate a winding up petition against the respondent under s 217(1)(b) of the Act. If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding up order (see *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49). In that situation, the petitioner has no locus standi and the petition must fail (see *Mann & Anor v Goldstein & Anor* [1968] 2 All ER 769). Where a petition is based on a debt which is seriously disputed on substantial grounds, the petitioner is not a creditor (see *Re Lympne Investments Ltd* [1972] 2 All ER 385).

The Supreme Court in *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, has followed the test suggested by Crossman J, in *Re North Bucks Furniture Depositories Ltd* [1939] 2 All ER 549, namely, that a 'creditor' includes every person who has the right to prove in winding up.

The word 'creditor' is not defined in detail under the Act. Section 217(1)(b) of the Act only mentions 'any creditor, including a contingent or prospective creditor, of the company'. In the popular meaning of the word, 'creditor' is a person or company to whom money is owing. Zakaria Yatim J in *Jurupakat's* case has said that 'a creditor is a person who could enforce his claim against the company by an action of debt.' The claim or debt in question must not be in the form of unliquidated

damages (see *Pennington's Company Law* (1985) 5th Ed, p 843). When we talk about 'contingent creditor', it simply means that a person who could enforce his claim by an action of debt where the claim or the right to enforce such claim can be anticipated to arise if a particular event occurs. The words 'prospective creditor' refer to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future.

In the present case, the liquidator for the petitioner, in his affidavit in support (encl 4) has deposed that 'in carrying out his duties as the liquidator for the petitioner, he discovered from the account records that the respondent is indebted to the petitioner for a sum of RM18,133.68' being 'unpaid balance on goods sold and delivered and unpaid balance on services rendered and advanced. A statement of accounts dated 31 July 2001 (exh 'KKM-2' was sent to the board of directors of the respondent company requesting for payment 'as soon as possible' There is also an instruction in the said statement of accounts to the effect that 'any discrepancy in the statement must be reported to the petitioner in writing within ten days.' Apparently, there was no payment made by the respondent company and also no report on any discrepancy in the statement made within the stipulated time. In other words, the respondent company had not disputed the amount owed, as claimed by the petitioner.

The applicants contended that the debt is being substantially disputed and thus, the petitioner is not a creditor for the purpose of s 217(1)(b) of the Act. The applicants alleged that the substantial dispute on the debt is apparent from the two affidavits filed by the applicants.

It is well established that a petitioner cannot claim to be a creditor when the debt in question is seriously and substantially disputed, and thus cannot petition for winding up. There are strings of authorities on this principle. Among them are *Re Lympne Investments Ltd* [1972] 2 All ER 385, *Re Nima Travel Sdn Bhd* [1986] 2 MLJ 374, *Mark Jaya Engineering Sdn Bhd, v LFY Construction Sdn Bhd* [1990] 1 MLJ 372 and *Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd (formerly known as Jaya Chloride Standby Power Sdn Bhd)* [2000] 2 AMR 2495. In order for the principle to apply, the debt in question must be disputed by the company on some substantial ground and not just on some ground which is frivolous or without substance. The dispute must be based on solid grounds. If the dispute is on some ground which is frivolous or without substance, the court should ignore the dispute (see *Mann & Anor v Goldstein & Anor* [1968] 1 WLR 1091 at p 1096). It has also been stressed by Lord Greene MR in in *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 that the dispute must be bona fide dispute. A bona fide dispute must be made with substance by the respondent company (ie the debtor company itself). The person who disputes the debt must be the one who knows the background of the transactions which created the debt. In the present case, it must refer to the respondent company who actually knew whether the debt was due or not; whether there was still 'unpaid balance on goods sold and delivered and unpaid balance on services rendered and advanced.' Any third party, including other creditors (as in the present case) would not be in the

position to raise any bona fide disputes as to the debt. Here, there is no indication that the respondent company has disputed the debt at any time. The alleged dispute was only raised by the applicants, who are creditors to the respondent company, who have no knowledge about the events that led to the creation of the alleged debt.

The issue about the need for a bona fide dispute which must be based on solid grounds was touched by Megarry J in *Re Lympne Investments Ltd* when, at p 388, he said:

> I need only say that on the evidence before me, it seems quite plain that there is a bona fide dispute whether there is any debt at all, and that this dispute is not trivial or insubstantial but is based on solid grounds.

In the present case, I am of the view that the dispute raised by the applicants (not the respondent company) is not bona fide and not based on solid grounds. Thus the dispute, to borrow the words by Ungoed-Thomas J in *Mann & Anor v Goldstein & Anor*, 'should be ignored by the court.'

That being the case, I am also of the view that the petitioner qualifies to be a 'creditor' for the purpose of s 217(1)(b) of the Act, and has the necessary locus standi to petition for winding up of the respondent company.

On the question whether the applicants have locus standi to oppose the petition, the applicants submitted that the ex parte summons in chambers filed by the petitioner specifically seeks an order that the public auction scheduled to be held on 22 August 2001 be stayed. This auction was scheduled to be held pursuant to attachment orders dated 5 July 2001 obtained by the applicants. Therefore, they argued that the applicants are persons against whom the order to stay the auction is sought. They claimed to have the locus standi to oppose the petition and to apply to set aside the said ex parte order.

It is not disputed that the effect of the ex parte order obtained by the petitioner on 20 August 2001 is to stay the scheduled auction pursuant to an attachment order obtained by the applicants from the Temerloh Sessions Court on 5 July 2001. It is also not disputed that if the winding up petition against the respondent company is valid and successful, then the applicants' attempt to realize their respective debts from the respondent company will be hampered, and they will not have priority in relation to the respondent's assets and properties. In the premise, I am of the view that all the applicants have got definite interests in the outcome or the decision of the court in this proceeding. They have interest on the subject matter of the winding up, and in my view they have locus standi to oppose the petition as well as to apply to set aside the ex parte order obtained by the petitioner on 20 August 2001. In *Teck Yow Bros Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101, Abu Mansor J has also held that an objector who had an interest in the subject matter of the winding up petition has locus standi in the proceeding.

Verification of petition — r 26 of the Companies (Winding Up) Rules 1972

The applicants submitted that the petition filed by the petitioner is a nullity for failure to comply with r 26 of the Rules. They further submitted that the said defect is substantial and cannot be cured under s 221 of the Act or r 194 of the Rules.

Rule 26 requires that every petition for the winding up of a company by the court shall be verified by an affidavit, as in Form 7, made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be prima facie evidence of the statements in the petition.

In the present case, the relevant affidavit verifying the petition (encl 11) was sworn by the liquidator of the petitioner (duly appointed by the court on 10 August 2001). Section 236(2)(a) of the Act clearly empowers the liquidator to bring or defend any action or other legal proceeding in the name and on behalf of the company (the petitioner). For that purpose, the said liquidator is empowered to sign all documents and to affirm all affidavits for and on behalf of the petitioner relating to the legal proceeding. The said affidavit was sworn on 21 August 2001 and was filed and received by the High Court Registry on 22 August 2001. The petition (encl 5) was presented and filed on 17 August 2001.

Clearly, the said affidavit was sworn after the presentation of the petition. However, it was filed on the fifth day after the presentation of the petition. Rule 26 of the Rules requires that it must be filed within four days after the presentation of the petition. Obviously, it was filed one day outside the prescribed time. I think this is a proper case for the court to exercise it's discretion under r 193 of the Rules which reads:

> The court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding.

One day delay is not serious. No substantial injustice has been caused to the other parties. In *Re East Cambrian Gold Mining Co Ltd* (1865) 12 LT 587 and *Re London & Westminster Co-op Store Co* (1868) 17 LT 558, the court granted an enlargement of time to file the affidavit verifying the petition for winding up. In the first case, the affidavit was filed a few days after the fourth day; while in the second case, it was filed on the fifth day. However, in *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173, Syed Othman J rejected the same affidavit on the ground that the delay was too long a period, ie from 17 May 1977 to 19 March 1978.

Furthermore the one day delay, at most, can only be considered as an irregularity which can be cured under r 194(1) which says:

> (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that

A substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

Ex parte application to appoint provisional liquidator

The applicants also contended that the ex parte order obtained by the B petitioner on 20 August 2001 is a nullity on the ground that there is no provision in the Act or the Rules for the liquidator to move the court ex parte to appoint a provisional liquidator.

With respect, I cannot agree with the above contention. Section 231 of the Act clearly empowers the court to appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a C winding up petition and before the making of a winding up order, and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the Rules or as the court may specify in the order appointing him. There are also numerous authorities which show that an application D for the appointment of a provisional liquidator can be made ex parte after the presentation of the petition. In *South Downs Packers Pty Ltd v Beaver* (1984) 8 ACLR 990, Mc Pherson J has said, at p 994, that an application for appointment of a provisional liquidator can be made in the case of an insolvent company without notice to the company (ex parte) in cases of pressing urgency. He went on to say that there should be cogent evidence E that the delay involved in affecting service, or at least giving notice of the application, or the very fact of notice itself, is likely to be such as to defeat the purpose of appointing a provisional liquidator. Sir Robert Megarry VC in the case of *Re Highfield Commodities Ltd* [1985] 1 WLR 149 has also indicated that a provisional liquidator may be appointed ex parte subject to an undertaking in damages be provided by the applicant. In *Kong Long Huat* F *Chemicals Sdn Bhd v Raylee Industries Sdn Bhd* [1998] 6 MLJ 330, Abdul Malik Ishak J has also held (at pp 344–345) that:

> It is a correct statement of law to say and I so say that on an ex parte application, the applicant will be required to undertake and give an undertaking that if no order is made, he will compensate the company for any G damages that may flow from the appointment.

The same type of ex parte application to appoint a provisional liquidator was also entertained by the court, by way of its inherent jurisdiction, in *Re Lo Siong Fong* [1994] 2 MLJ 72 and *Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors* [1996] 2 MLJ 666.

H In the present case, there is prima facie evidence in the affidavit in support (encl 4) of the application to show the urgency of the matter. Basically, the ex parte application by the petitioner was for the purpose of appointing a provisional liquidator of the respondent company for the provisional liquidator to take possession, control and protect the assets or realize the assets of the respondent, and such assets are not to be distributed I or parted with until further order for the auction sale scheduled on 22 August 2001 be stayed pursuant to ss 223 and 224 of the Act. The affidavit of the petitioner shows that several creditors of the respondent (ie

the applicants in the present applications) had begun attachment before judgment proceedings against the respondent and had obtained the relevant order from the Temerloh Sessions Court. The petitioner obtained this information on 14 August 2001. It was further informed that the Bailiff of the Temerloh Sessions Court had taken possession and attached the respondent's business premises at Wisma Emporium Jaya, Jalan Kuantan, 27000 Jerantut, Pahang. The auction had been fixed on 22 August 2001. There are more unsecured creditors than that were listed in the proclamation of sale. Therefore, the appointment of a provisional liquidator is necessary to prevent undue preference among the creditors and to prevent unfair distribution of the respondent's assets. It is also to prevent multiplicity of court proceedings and to save judicial time and costs.

The application was filed in court on 17 August 2001, together with a certificate of urgency. The application was fixed to be heard on 20 August 2001. The auction was scheduled to be held on 22 August 2001. In that circumstances, I am satisfied that there is cogent evidence to show that the delay in affecting service or giving notice of the application to all related parties, is likely to defeat the purpose of the application. By the time service is done, the auction could have been completed and the purpose of the application would be fully frustrated.

Furthermore, the petitioner has given the usual undertaking in damages which the court may make if the court was of the opinion that the respondent company shall have sustained (see para (c) of the summons in chambers).

That being the case, the said ex parte application by the petitioner (encl 3) need not be served on the respondent as well as on every person against whom the order is sought as required under r 7(2) of the Rules.

Non-disclosure of material facts

The applicants also submitted that the ex parte order should be set aside on the ground that the affidavit of the liquidator (encl 4) in support of the ex parte application by the petitioner does not disclose material facts relevant to the case. The so called 'material facts' which were not disclosed in the affidavit are as follows:

(a) that he (Koh Khong Min) was appointed liquidator by Megah Supermarket & Departmental Store Sdn Bhd, against Emporium Jaya (Bentong) Sdn Bhd, in Petition No 28–3 of 2001 on 10 August 2001;

(b) that he had a conversation at Johor Bharu on 14 August 2001 with the solicitors for the applicants who had attached the goods of the respondent on 18 July 2001 to the auction on 22 August 2001;

(c) that he had written the letter to the solicitors representing the applicants who attached the goods of Emporium Jaya (Jerantut) Sdn Bhd;

(d) all the audited accounts of the petitioner in liquidation for whom he was appointed as the liquidator;

(e) that the said Megah Supermarket & Departmental Store Sdn Bhd, has been at all material times negotiating with him as such liquidator for the purchase the Emporium Jaya chain from him;

(f) a list of all the unsecured creditors to support his application to appoint himself as the provisional liquidator; and

(g) that all the Emporiums at Jerantut, Kuala Lipis, Raub and Bentong have ceased business and were shut down.

The basic principle of law applicable in this issue was that the failure of the petitioner to make a full and frank disclosure of all relevant or material facts in their ex parte application, would empower the court to set aside the ex parte order (see *Kong Long Huat Chemicals Sdn Bhd v Raylee Industries Sdn Bhd.* In *R v Kensington Income Tax Commissioners; ex p Princess Edmond de Polignac* [1917] 1 KB 486, it was held that the rule requiring full and frank disclosure of material facts applies in ex parte applications and the applicant who fails to do so will be deprived of the benefits of the order without going into the merits. The Supreme Court of Queensland had occasion to consider non-disclosure of material facts in the application for an appointment of a provisional liquidator in *South Downs Packers Pty Ltd, v Beaver.* In that case, Campbell CJ has this to say:

> The question was whether the several allegations of non-disclosure in the present case, read in the context of the other materials before the Master, were such as to lead to the conclusion that his Honour erred in not holding that the Master was thereby led or induced to appoint a provisional liquidator in the circumstances. Or, to put it in another way, did his Honour err in not finding that such non-disclosed facts were important to the master in the formation of the latter's conclusion that the case was one for the appointment of a provisional liquidator.

Connolly J in the same case (with whose reasons Campbell CJ agreed) has said:

> the undisputed circumstances of the case warranted the appointment of a provisional liquidator. Not one of the allegations of non-disclosure touched or qualified in the slightest the essential facts. All were carefully considered by Mathews J who concluded that there had been no material non-disclosure.

In the present case before me, I have considered carefully all the so called 'undisclosed facts' alleged by the applicants and am satisfied that they are not material and not relevant in the context of the other materials before me at the stage of the ex parte application by the petitioner. Such 'undisclosed facts' are not really essential in determining the issue relating to an appointment of a provisional liquidator.

The petitioner's ex parte application was supported by it's liquidator's affidavit. All the material and relevant facts for consideration were there. I do not think there was any lack of full and frank disclosure. There is no question that the petitioner has suppressed the material evidence in it's affidavit.

Statutory notice under s 218(2)(a) of the Companies Act 1965

The petition is based on s 218(1)(e) and/or 218(1)(i) of the Act, ie:

(a) the respondent company is unable to pay it's debt; and/or

(b) it is just and equitable that the respondent company be wound up.

The applicants contended that s 218(1)(e) must be read together with s 218(2)(a), (b) and (c) which defines 'inability to pay it's debt'. The applicants further contended that the statutory notice under s 218(2)(a) to be issued and served on the respondent is a condition precedent which must be complied with before the petitioner can rely on the presumption of inability to pay the respondent's debt, in its petition. Therefore, the applicants argued that in the present case, there is no proper, valid or effective petition filed by the petitioner and thus, the ex parte order granted on 20 August 2001 is also invalid and must be set aside.

In order to invoke the ground under s 218(1)(e), ie the respondent is unable to pay its debt, the petitioner may choose to prove it by positive and direct evidence during the hearing of the petition that the respondent is insolvent and unable to pay its debt. Alternatively, the petitioner may rely on the statutory presumption provided under s 218(2)(a), (b) or (c). McPherson in the *Law of Company Liquidation* (3rd Ed) at p 54, says:

> A creditor is entitled to adduce positive evidence in order to satisfy the court of the company's inability to pay its debt without resorting to either of the statutory presumptions. If the petitioner chooses to prove its case by positive and direct evidence during the hearing of the petition, the question of complying with the requirements under s 218(2)(a), (b) or (c) does not arise. If the petitioner chooses to rely on the presumption under s 218(2), the petitioner only needs to rely on any one of the provisions (a), (b) or (c), not all the three. Section 218(2)(a), (b) and (c) are mutually exclusive, and on the facts and in the exercise of its discretion, a company can be wound up by the court on any one of the grounds in (a), (b) or (c).

In this regard, I am in full agreement with Abu Mansor J in *Teck Yow Bros Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd* when he ruled:

> As for the contention that no proper notice under s 218(2)(a) of the Act has been given I find in this case that the notice is in the circumstances unnecessary and I order that it be dispensed with as the petition is not wholly founded under s 218(2)(a) of the Companies Act. I am of the view that s 218(2)(a), (b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the court on any of the grounds (a), (b) or (c).

Section 218(2)(a), (b) and (c) of the Act provides:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the companies is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the

company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

In the present case, there is no indication that the petitioner is relying on s 218(2)(a). Therefore, the question of the statutory notice under the section does not arise. Apparently, the petitioner is relying on s 218(2)(b) and (c) to file its petition to wind up the respondent company. The fact that the respondent company has ceased operations, and all the applicants are judgment creditors to the respondent company, and orders for attachment against the respondent were granted by the Temerloh Sessions Court and an auction had been fixed on 22 August 2001 clearly shows that there is prima facie evidence, at the stage of filing the petition, that the company is unable to pay its debt under s 218(2)(b) and (c).

The applicants also complained that the petition does not make specific reference either to s 218(1)(e) or s 218(1)(i) relying its petition. My understanding of this complaint is that the petitioner must choose and state specifically either one of the sections relied upon, ie either s 218(1)(e) or 218(1)(i), but not both. I am of the view that in a petition, a petitioner may choose any one or more of the grounds for winding up as specified in the Act. There is nothing in the law to say that a petitioner can only rely on one ground but not more. *Halsbury's Law of Malaysia* Vol 1, Civil Procedure, at para 110.029 says:

> In his petition a petitioner must allege or prove the facts entitling him to present it, shown that one or more of the ground specified in the Companies Act 1965 for making a compulsory order exist. Unless these allegations are contains in the petition, it is misconceived and the court will dismiss it.

Therefore, I find that the applicants' complaint on this issue is baseless and without merit.

Appointment of a provisional liquidator

In the case of a winding up proceeding by the court, s 231 of the Act provides for a provisional liquidator to be appointed. However, a court will not appoint a provisional liquidator consequent upon the presentation of a winding up petition unless there is a good prima facie evidence that the company will be wound up because the company is obviously insolvent, or the company's assets are in jeopardy, or it is just and equitable to wind up the company, or there are other circumstances which make it imperative for the court to intervene (see *Re Highfield Commodities Ltd* [1984] 3 All ER 884). In determining whether a winding up order will be made for the

purpose of appointing a provisional liquidator under s 231 of the Act, the court should first look at the sufficiency of the allegations in the petition. The primary facts set out in the petition if assumed to be true, and the uncontested evidence taken as a whole must add up to the conclusion that it is imperative that a winding up order be made (see *Kok Fook Sang v Juta Vila (M) Sdn Bhd* and *Tuan Haji Ishak Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661).

In the present case, I am convinced and satisfied that there is sufficient prima facie evidence to support an appointment of a provisional liquidator under s 231 of the Act. The respondent company, which has ceased operations since May 2001, is indebted to the petitioner in the sum of RM18,133.68. The applicants have obtained orders for attachment of the respondent's assets and properties from the Temerloh Sessions Court. The bailiff had taken possession and attached the business premises of the respondent. The date for the auction has been fixed on 22 August 2001. In the circumstances, the petitioner verily believed that the respondent company is insolvent and is unable to pay its debt. The petitioner also believed that it is just and equitable that the respondent company be wound up. In the present situation, the petitioner also verily believed that the winding up of the respondent company ought to be granted for the benefit of all the creditors, and its assets be distributed according to the law and no undue preference be created. The petitioner has reasons to believe that there are more unsecured creditors than that were listed in the proclamation of sale and the appointment of a provisional liquidator shall prevent unfair distribution of the respondent's assets. In *Re Mc Lennan Holdings Pty Ltd* [1983] 7 ACLR 732, the Australian Court held that:

> ... after the due presentation of a petition to wind-up which discloses proper grounds for winding up, the discretion to appoint a provisional liquidator is not limited.

In determining whether or not to appoint a provisional liquidator, the court must consider the degree of urgency, the balance of convenience and the need established by the petitioner. At this stage, I think it is useful to quote the passage from the 1975 judgment of Bright J of the Supreme Court of South Australia in *Re Clubs Mediterranean Pty Ltd* (1975) 1 SASR 481, at p 484 that McPherson on the *Law of Company Liquidation* (3rd Ed) quotes at p 100:

> Where the petitioning creditor makes the application and the company opposes it the court must come to a conclusion as to the degree of urgency and of need established by the petitioning creditor and the balance of convenience. The circumstances will vary. Sometimes the company may be continuing to trade at a loss or to incur further liabilities. Sometimes assets may require to be protected from dissipation or from seizure or encumbrances.

In the present case, the element of urgency in the petitioner's application to appoint a provisional liquidator is real. The application was filed on 17 August 2001 and fixed for hearing, on a certificate of urgency, on 20 August 2001. The proclamation of sale of the respondent's assets was issued and the date for public auction was fixed on 22 August 2001. The

application was granted by this court on 20 August 2001 and the order was served on the relevant parties or their solicitors on 21 August 2001. In this case, the petitioner cannot afford to delay its application even for another day. Time is really precious.

The need of the petitioner in making the application is that upon the appointment of the provisional liquidator, he shall take into possession of the movable assets as contained in the inventory list of the proclamation of sale and also its immovable assets pursuant to s 233 of the Act so as to prevent unfair distribution of the assets among all the unsecured creditors and to avoid undue preference being created. When a provisional liquidator has been appointed, s 233 of the Act empowers the provisional liquidator to take into his custody or under his control all the property and things in action to which the respondent company is or appears to be entitled. The auction sale scheduled on 22 August 2001 or on such other date that may be fixed later against the assets of the respondent's company needs to be stayed pursuant to ss 223 and 224 of the Act. Section 223 of the Act provides:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

Section 224 of the Act provides:

> Any attachment, sequestration, distress or execution in force against the estate of effects of the company after the commencement of the winding up by the court shall be void.

Under s 219(2) of the Act, a winding up shall be deemed to have commenced at the time of the presentation of the petition for winding up, (see also *Kredin Sdn Bhd v Development and Commercial Bank Bhd* [1995] 3 MLJ 304).

The cut off point for the purpose of ss 223 and 224 of the Act is 'after the commencement of the winding up by the court', ie at the time of the presentation of the petition for winding up, which in the present case is 17 August 2001. The applicants argued that the attachment on the respondent's assets was initiated by the court bailiff on 18 July 2001 pursuant to the said order of attachment dated 5 July 2001 granted by the Temerloh Sessions Court. This, the applicants argued, was done before (not after) the presentation of the petition on 17 August 2001. However, the execution was not completed, in the sense that the sale of the assets was not yet implemented when the petition was presented. The sale of the assets was scheduled to take place on 22 August 2001, after the presentation of the petition. This is clearly a case of an uncompleted execution when the petition was presented.

It must first be stressed here that the requirement under s 224 is clearly mandatory not only because the word 'shall' is used in the section but also because, unlike s 223 of the Act which provides, inter alia, that any disposition of the property of the company after the commencement of the

winding up by a court shall be void unless the court orders, there is no such validating power given to the court to validate the things done under s 224 of the Act. A

In the present case, the said attachment and proclamation of sale of the respondent's assets are in the nature of an execution of judgment or order of the court, (ie the Temerloh Sessions Court). In *Re Overseas Aviation Engineering (GB) Ltd* [1963] 1 Ch 24, Lord Denning observed that 'execution means, quite simply, the process of enforcing or giving effect to the judgment of the court.' Therefore, I am satisfied that the applicants' attachment and execution process against the assets of the respondent company falls within the ambit of the s 224 of the Act. B

In *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Anor* [1992] 1 MLJ 571, Lim Beng Choon J has said: C

> It is absolutely clear to me that the purpose of enacting s 224 is to ensure that between the date of the presentation of a winding up petition and the date of the passing of the winding up order the property of the company should not be dissipated to enrich one or more unsecured creditors at the expense of other unsecured creditors. D

The court will not allow one creditor, however diligent he may be, to get an advantage over the others by getting in first with the attachment before judgment, knowing that the respondent has stopped its business operations and was likely to be insolvent (see Lord Denning's speech at p 1001 in *Pritchard v Westminster Bank Ltd (Garnishee)* [1969] 1 All ER 999). E

The question is whether s 224 of the Act can be invoked in cases where execution has started before presentation of a petition but not completed when the petition is presented, as in the present case.

Unlike s 298(2)(a) of the Act which provides, inter alia, that for the purpose of that section, an execution against goods is completed by seizure and sale, there is no such provision under s 224. However, the words 'put in force ... after commencement', as used in s 224 must be interpreted to mean that the said execution must have been fully effective and completed after the presentation of the petition. If the execution is still not completed (as in the present case) at the time of the presentation of the petition, then s 224 can be invoked and further steps to complete the execution after the presentation of the petition must be avoided. In *Official Reciever v J Grind* (1933) 7 FMSLR 48, it was held that attachment proceedings were avoided if not completed by the sale before commencement of winding up petitions. Again, in *Supreme Holdings Ltd v The Sheriff, Supreme Court of Singapore & Anor* [1987] 1 MLJ 10, it was also held that as the seizure and sale was not completed before commencement of the petition, the execution creditors could not enjoy the benefit of the execution. F G H

This interpretation is in line with the provisions of s 298(2)(a) of the Act. Eventhough s 298(2)(a) is only for the purpose of s 298, but in interpreting s 224 in relation to the same issue, it must be interpreted in line and consistent with s 298, otherwise the basic purpose of ss 224 and 298 could not be achieved. Problems may arise if the applicants manage to I

escape s 224 at this stage (if the interpretation to s 224 differs from the above interpretation) but later when the respondent company is wound up, they have to be caught by s 298, because s 298(1) provides 'unless he has completed the execution or attachment before the date of the commencement of the winding up' and s 298(2)(a) clearly says that an execution against goods, for the purpose of that section, is completed by seizure and sale.

Another pertinent issue raised by the applicants in the present case is whether ss 298(1)(c) and 299(3) of the Act can be invoked by the court. Section 298(1)(c) provides:

> (1) Where a creditor has issued execution against the goods or land of a company, or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up, but —
>
> (a) ...
>
> (b) ...
>
> (c) the rights conferred by this section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

Section 299(1) of the Act requires the bailiff who has taken any goods of the company in execution and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, upon notice being served on him that a provisional liquidator has been appointed (as in the present case), he shall on being so required, deliver the goods and money seized or received to the liquidator. Section 299(3) also provides:

> The rights conferred by this section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

The purpose of s 298 is to empower the liquidator to recover any dissipation of the assets of the company which has been acquired by a creditor by way of an attachment or execution which has not been completed before the date of the commencement of the petition. This section is applicable when the assets of the company had been wrongly acquired by a creditor through an evasion of the prohibition set out in s 224. In cases where the prohibition set out in s 224 is fully and effectively applied, then s 298 may not come into picture at the stage when a winding up order is made by the court. In any event, s 298 is only applicable when the company is wound up, but not prior to that. In the present case, we have not reached that stage yet. Therefore, the provision of s 298(1)(c) of the Act is not applicable and cannot be invoked by the court at this stage of the proceeding.

Section 299(3) is in pari materia with s 298(1)(c). This provision, gives the court jurisdiction to do what is right and fair according to the

circumtances of each case (see *Armorduct Manufacturing Co Ltd v General Incandescent Co Ltd* [1911] 2 KB 143, *Re Grosvenor Metal Co Ltd* [1949] 2 All ER 948 and *Re Suidair International Airways Ltd (in liquidation)* [1950] 2 All ER 920. However, it must be stressed here that this discretion must not be exercised if the effect is to defeat the basic scheme of the Act, ie in cases where the company is insolvent, the interest of creditors is paramount and in a winding up, unsecured creditors rank pari passu, and that an execution creditor who has not completed his execution at the commencement of the winding up is for this purpose, in the same position as any other unsecured creditor (see *Re Redman (Builders) Ltd* [1964] 1 WLR 541 (at p 46). It was also held in *Re Redman (Builders) Ltd* that the court is not bound to exercise the discretion in a manner which seems to be unjust and unreasonable.

In *Kumarasamy v Haji Daud* [1972] 2 MLJ 16, Syed Othman J in dealing with the same s 299(3) of the Act, held:

> The principle in this case can be put in this form. If a company which is in the process of winding up is responsible for staying the hands of a judgment creditor in the matter of execution even in good faith then the rights of the liquidator will have to be set aside in favour of the judgment creditor.

In that case, s 299(3) was invoked on the ground that all the indication showed that it was the liquidator, who, acting on his own, was responsible for staying a sale which the court has ordered.

Again, in *Re Grosvenor Metal Co Ltd*, the rights of the liquidator was set aside in favour of the execution creditors on the ground that the execution creditors were persuaded, induced or requested by the company to stay their hands in the matter of the execution. If not for their requests and the pressure the company put on the execution creditors, the execution would have been completed before the commencement of the winding up petition.

Back to the present case, there is no indication at all to show that the respondent company or the liquidator has any hand to play that has resulted in the execution not being completed at the commencement of the petition. There is no sufficient evidence to help this court to invoke s 299(3) of the Act in favour of the applicants. In fact, I am satisfied that it would be unjust and unreasonable in the present circumstances for the court to invoke that section in favour of the applicants, at the expense of the other unsecured creditors. To do so is contrary to the basic scheme of the Act which I have mentioned earlier. It would be manifestly unjust to the other creditors. The respondent company was insolvent at the material times. There are other trade creditors at bay. These appear to be no conceivable reasons why one or two execution creditors, which had not completed its execution, should be preferred to the other creditors. Therefore, I am of the view that this is not a proper case for the court to exercise it's discretion under s 299(3) in favour of the applicants.

The ex parte order dated 20 August 2001 granted to the petitioner also includes an order that all further civil actions against the respondent company shall be stayed pursuant to s 222 of the Act pending the hearing

of the winding up petition. This stay is really necessary to ensure that assets of the respondent company are distributed *pari passu* among the creditors by avoiding a scramble to enforce claims. Further, it is the policy that all claims should generally be disposed of by the cheap summary procedure of proving a debt in the winding up rather than by dissipating the assets in a multiplicity of suits (see *Chatib bin Kari v Mosbert Bhd (in liquidation)* [1984] 2 MLJ 67; *Re Perdana Merchant Bankers Bhd* [1997] 3 MLJ 435). In any event, on a provisional liquidator being appointed, an automatic stay comes into effect by virtue of s 226(3) of the Act, which says:

> (3) when a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —
>
> (a) by leave of the court; and
>
> (b) in accordance with such terms as the court imposes.

On the issue of balance of convenience, the court has to see where the justice lies. The court has to weigh the interests of all the parties concerned as well as the effect of the court order on them. If the petitioner's ex parte application is refused, the three applicants can proceed with their execution process and the scheduled auction sale may proceed on 22 August 2001. If that happens, the three applicants may be able to satisfy their respective claims as judgment creditors in their suits at the Temerloh Sessions Court, where judgment in default of appearance have been granted, at the expense of other unsecured creditors. In effect, the applicants will get priority in satisfying their claims eventhough the respondent company was already insolvent at that time. The other unsecured creditors may be with nothing, as at that material times, the responden company was already insolvent. The basic scheme of the Act is that, in a winding up, unsecured creditors ranked *pari passu* and that an execution creditor who had not completed his execution at the commencement of the winding up was for that purpose in the same position as any other unsecured creditor. All the relevant provision under the Act which I have cited earlier in this grounds of judgment, were enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors (see *Kredin Sdn Bhd v Development & Commercial Bank Bhd*, per Siti Norma Yaakob JCA (as she then was)).

In the present case, justice requires that the petitioner's ex parte application (encl 3) should be granted, pending the disposal of the winding up petition filed against the respondent company. To refuse the application would be manifestly unjust to the petitioner and the other unsecured creditors.

Conclusion

For the above reasons, the applicants' applications wide summonses in chambers (encll 14, 18 and 22) are dismissed with costs. The ex parte order which was granted by this court on 20 August 2001 should stay until the disposal of the winding up petition against the respondent company.

Application dismissed.

Reported by Peter Ling